

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

ROBERT O. CARON,

Defendant

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Criminal No. 03-79-P-H

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Robert O. Caron, charged with knowingly possessing images of child pornography in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252(b)(2), seeks to suppress the fruits of the searches of the hard drive of his personal computer and a room in his residence. Indictment (Docket No. 1); Defendant's Memorandum of Law in Support of Motion to Suppress Evidence ("Motion") (attached to Defendant's Motion to Suppress Evidence (Docket No. 18)) at [1]-[3]. An evidentiary hearing was held before me on February 13, 2004 at which the defendant appeared with counsel. The government called three witnesses and introduced seven exhibits, which were admitted without objection. The defendant called no witnesses and offered no exhibits. Counsel for the parties argued orally at the close of the hearing and submitted supplemental memoranda of law. Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On January 20, 2003 the defendant brought his personal computer to Computer Place, located at 1485 Lisbon Street in Lewiston, Maine, for repair. He told Brett Jarvis, the owner and primary repair

technician at the business, that the computer was locking up or freezing. He did not suggest what might be causing this problem. The City of Lewiston and the Maine Computer Crime Task Force are customers of Computer Place; the Task Force spent about \$5,000 at the store three years ago and about \$1,300 in 2003. The city buys computers and components; Jarvis has done very little repair work for the city. He knows that Detective James Rioux works with the Task Force, but Rioux is not a friend. Jarvis had never assisted Rioux in a criminal matter before this event.

Jarvis told the defendant that he would take a look at the computer and the defendant left. When a computer repeatedly locks or freezes up, the problem is usually a virus or a corruption of the Windows operating system. Jarvis followed his usual procedure, which is to start the computer and try to get it to do what the customer is complaining about. When the problem is locking or freezing, Jarvis always goes first to the My Documents and My Pictures files in order to load up and stress the system. When he did this with the defendant's computer, he saw five to seven pictures of young children, about five to ten years old, nude and facing the camera. He stopped what he was doing and called the Lewiston police department. He had seen images of naked adults before when repairing computers but had not seen images of naked children. This was the first time he had called the police after seeing images of naked people.

Jarvis had talked earlier that day with Rioux to arrange for Rioux to pick up some computer cables, so Jarvis tried to call Rioux. Rioux was not inside the police station, so Jarvis talked to Detective Scot Bradeen. Bradeen told Jarvis to turn the computer monitor off because it faced the front of the store; Jarvis did so. Bradeen paged Rioux, who returned from the police department parking lot. Bradeen told Rioux that Jarvis had reported finding images of children that he thought were illegal on a computer. Rioux got a digital camera and called Jarvis, who told him that while attempting to repair a computer he had brought up a photograph of three young children with their genitalia exposed. Rioux drove to Computer Place and

went in. After waiting for the only customer in the store to leave, he asked Jarvis, “What do you have to show me?” and asked him to turn the computer monitor on.

The computer was in a work station at the back of the store, in an area behind a half wall. All three work stations in the store are arranged in this space so that the monitors are visible from the front of the store.

After Jarvis turned on the monitor, the image came up. Rioux took a picture of the image as displayed on the monitor screen (Government Exhibit 1) and asked Jarvis to turn the computer off and remove its hard drive, which Jarvis did. Rioux took the hard drive and the cables which he had originally planned to pick up and left the store after Jarvis had given him the defendant’s name and address. Rioux recognized the name and address because the defendant had taught Rioux’s children in elementary school. Rioux has participated in over 500 pornography investigations; he recognized the image on the defendant’s computer as one that he had seen at least 12 times before. He knew that the image was used as a teaser to lure viewers into pay-per-view sites with more graphic pornography.

Rioux returned to the police station and spoke to Bradeen and Assistant District Attorney Craig Turner. Turner told him that the single image constituted probable cause because it was so well known, but suggested that Rioux call the defendant before seeking a search warrant, which Rioux then did. Rioux informed the defendant that there was a problem with images that had been found on his computer and that Rioux would like to talk with him. He told the defendant that he would not be arrested. The defendant arrived at the police station less than 30 minutes later.

Rioux and Bradeen talked with the defendant in the Task Force office, a 17 by 26 foot space with no windows. The door was not locked but was closed due to the nature of the material being viewed and discussed. The defendant was told that he was not under arrest and could leave at any time. Rioux read

the defendant his Miranda rights and the defendant signed a waiver card (Government Exhibit 3). The defendant was shown Rioux's photograph and asked if he recognized the image; he said yes. Rioux loaded the image on his personal computer and showed it to the defendant, asking him the ages of the children in the image. The defendant estimated their ages as 8 to 10 years.

Rioux asked for consent to search the hard drive from the defendant's computer. The officers had not tried to access the hard drive before obtaining the defendant's consent. The defendant signed a form giving consent (Government Exhibit 5). Rioux made sure that the defendant read the form before signing it. Rioux then asked whether the defendant had any movable media with similar images. The defendant replied that he had a couple of zip discs at home with similar images and that he would turn them over. He agreed to allow the officers to accompany him to his house to retrieve them. When they arrived at the house, the defendant invited the officers in and went to a back room. He brought out two discs and gave them to Bradeen. The officers asked if they could look around the back room and the defendant replied "Not a problem at all." Bradeen found 25 more discs in the back room.¹ Rioux prepared a property release form for the discs (Government Exhibit 6), which the defendant signed. The defendant read and signed a consent form allowing a search of the discs (Government Exhibit 7).

II. Discussion

In his oral argument, counsel for the defendant contended that he only needed to prove that Jarvis aided Rioux in entering an area in which the defendant had a reasonable expectation of privacy in order to establish that Jarvis was a government actor; that the evidence was not in plain view when Rioux entered the store and that his instruction to Jarvis to turn on the monitor was the equivalent of opening a sealed package,

¹ This is Rioux's testimony. Bradeen testified that the defendant initially produced 25 discs and that Bradeen found 2
(continued on next page)

making the search unlawful; that Rioux had time to obtain a search warrant after seeing the first image and should not have seized the hard drive without doing so; and that the testimony of Rioux and Bradeen differed significantly concerning the scope of the defendant's consent to search. These arguments are not mentioned in the memorandum filed by counsel for the defendant after the hearing, which contends that Rioux "impermissibly varied the nature of his search from that undertaken by Mr. Jarvis, and did so utilizing a manner and degree of intrusion that was not reasonably foreseeable by Mr. Caron," Defendant's Supplemental Memorandum of Law in Support of Motion to Suppress Evidence ("Supplemental Memorandum") (Docket No. 30) at 4; that the defendant's consent to the search of his hard drive was not given voluntarily "as it was given under inherently coercive circumstances," *id.* at 6; and that the defendant's answers to questions posed to him at the police station were coerced "by the existence of the improperly obtained photograph," *id.* at 7. In the memorandum of law submitted in support of the motion to suppress at the time it was filed, the defendant also contended that Jarvis's initial viewing of the images was not a private party search, but rather a search by a government actor due to "Mr. Jarvis' close and long-standing ties to the Lewiston Police Department," Motion at [5]; that Rioux lacked probable cause to seize the hard drive because he did not lawfully view the image on the computer monitor at Computer Place and because the incriminating nature of the image was not immediately apparent, *id.* at [6]; and that the defendant's statements at the police station were coerced because he knew that the police had already searched his hard drive and had printed at least one image from the hard drive, *id.* at [8].

Several of these arguments fail based on the undisputed facts presented at the hearing. Rioux and Bradeen did not search the hard drive before the defendant gave them permission to do so. The image that

more in his search of the room. The difference is immaterial for purposes of the motion to dismiss.

was shown to the defendant at the police station was the photograph that Rioux had taken of the image on the monitor at Computer Place; Rioux also showed the defendant this image after loading it onto Rioux's computer. The incriminating nature of this image was immediately apparent to Rioux, who had seen it many times in the course of his pornography investigations. The testimony of Rioux and Bradeen did not differ significantly about the scope of the defendant's consent to search, either at the police station or at the defendant's residence.

Jarvis was not a government actor under the circumstances of this case. There is no evidence to support the defendant's contention that he had "close and long-standing ties to the Lewiston Police Department." He had made some sales to the city and to the task force on which Rioux served. In order to have been acting for the government when he first viewed the images at issue on the defendant's computer, the government must have known of or acquiesced in Jarvis's conduct and Jarvis must have intended to assist law enforcement by conducting the "search," and both the knowledge and the intent must have preceded the conduct. *United States v. Barth*, 26 F.Supp.2d 929, 935-36 (W.D. Tex. 1998); *United States v. Peterson*, 294 F.Supp.2d 797, 803-05 (D.S.C. 2003). That was not the case here. In *Barth*, the computer technician who found images of child pornography on the defendant's computer was, by coincidence, a confidential informant for the FBI, but he was not found to be a government actor. 26 F.Supp.2d at 932, 935. Jarvis's ties to the Lewiston Police Department were clearly not so "close and long-standing" as those found insufficient in *Barth*. Counsel for the defendant has cited no authority in support of his oral argument that by aiding Rioux in entering an area in which the defendant had a reasonable expectation of privacy (presumably the work station at the rear of the store) Jarvis became a government actor. My research has located none. Indeed, as discussed below, the defendant had no reasonable

expectation of privacy in any of the images Jarvis had seen by the time Rioux arrived at Computer Place, so this argument lacks a legal foundation in any event.

In *United States v. Jacobsen*, 466 U.S. 109 (1984), the defendant sought suppression of cocaine found in a damaged package that had been opened by employees of Federal Express. *Id.* at 111. The employees had opened the package in accordance with company policy, finding a series of plastic bags containing white powder. *Id.* They notified the Drug Enforcement Administration (DEA) and reassembled the box, although they did not reseal it. *Id.* The cocaine was not visible once the box was reassembled. *Id.* A DEA agent arrived and removed the cocaine from the box and bags. *Id.* at 111-12. The Supreme Court held that “[t]he initial invasions of respondents’ package were occasioned by private action. . . . [T]hey did not violate the Fourth Amendment because of their private character.” *Id.* at 115. The subsequent actions of the DEA agent “must be tested by the degree to which they exceeded the scope of the private search.” *Id.* “The Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated.” *Id.* at 117. The Supreme Court held that the agent’s removal of the plastic bags from their packaging and a visual inspection of their contents “enabled the agent to learn nothing that had not previously been learned during the private search” and accordingly violated no legitimate expectation of privacy. *Id.* at 120. Thus, because “it is constitutionally reasonable for law enforcement officials to seize ‘effects’ that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband,” *id.* at 121-22, it was reasonable for Rioux to seize the defendant’s hard drive after viewing the single image that he recognized as one that was used frequently in connection with internet child pornography sites and it was also permissible for Rioux to view the image, although Jarvis had turned off the computer monitor after

viewing the image himself and only turned it on again after Rioux arrived. Whether the image was in “plain view” when Rioux arrived at Computer Place is irrelevant.

Contrary to the defendant’s contention, Rioux’s search did not vary from that conducted by Jarvis; in fact, Rioux only viewed one image, while Jarvis had viewed five to seven. Since, before obtaining the defendant’s consent to do so, Rioux did not examine anything that Jarvis had not already seen his search did not exceed the scope of Jarvis’s search. *United States v. Runyan*, 275 F.3d 449, 461 (5th Cir. 2001). Merely photographing or printing the image already viewed did not exceed the scope of Jarvis’s search.² Certainly Jarvis’s view of files stored on the defendant’s computer was foreseeable once it was left with him for repair. It follows that he had no reasonable expectation of privacy in the images so stored once Jarvis had seen them, and the subsequent police search —viewing one of the images seen by Jarvis— could not have violated the Fourth Amendment. *United States v. Paige*, 136 F.3d 1012, 1020 (5th Cir. 1998). In a case similar on its facts, the Fifth Circuit held that a police detective’s viewing of seventeen images previously seen on the defendant’s computer by a repair technician was within the scope of the private-party search and in an area where the defendant no longer possessed a reasonable expectation of privacy. *United States v. Grimes*, 244 F.3d 375, 377-78, 383 (5th Cir. 2001). *See also United States v. Simpson*, 904 F.2d 607, 610 (11th Cir. 1990).

Since Rioux’s viewing of the single image and his seizure of the hard drive were constitutionally permissible, these facts could not constitute “inherently coercive circumstances” as the defendant contends in seeking to invalidate his consent to subsequent searches and to suppress his statements to Rioux and Bradeen. The defendant contends that his consent was given under inherently coercive circumstances only

² “[T]he use of photographic equipment to gather evidence that could be lawfully observed by a law enforcement officer (continued on next page)

in that “he was faced with the fruits of the prior illegal search (the photograph of the image file from his hard drive) at the time his consent was sought.” Supplemental Memorandum at 6. Having determined that there was no illegal search, I can only conclude that the defendant’s contention that his consent was coerced must fail as well. The same is true of his assertion that his statements to the officers were not voluntary. *See generally United States v. Twomey*, 884 F.2d 45, 51 (1st Cir. 1989); *United States v. Esquilin*, 42 F.Supp.2d 20, 27 (D. Me. 1999).

III. Conclusion

For the foregoing reasons, I recommend that the defendant’s motion to suppress be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 9th day of March, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate

Defendant(s)

ROBERT O CARON (1)

represented by

does not violate the Fourth Amendment.” *United States v. McIver*, 186 F.3d 1119, 1125 (9th Cir. 1999).

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